Supreme Court, U.S.
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No. 91-179

In The

Supreme Court of the United States

October Term, 1991

ROBERT B. ENRIGHT, JR.,

Petitioner,

v.

CALIFORNIA STATE UNIVERSITY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did respondent California State University properly rely on its affirmative action plan when making the decision to hire a fully qualified female applicant instead of petitioner?

TABLE OF CONTENTS

Page

RESPONDENT'S BRIEF IN OPPOSITION 1

STATEMENT OF THE CASE 1

A. Summary of Material Facts 1

B. Summary of Procedural History 4

REASONS WHY THE WRIT SHOULD BE DENIED .. 5

I. THE NINTH CIRCUIT PROPERLY DETERMINED THAT THE UNIVERSITY'S APPLICATION OF ITS AFFIRMATIVE ACTION PLAN WAS VALID UNDER *JOHNSON* v. *TRANSPORTATION AGENCY*, 480 U.S. 616 (1987) 5

A. The *Johnson* Case 6

B. The Statistics and Pools Considered by the University Showed "Conspicuous" or "Manifest" Imbalance 8

II. THE UNIVERSITY SUBSTANTIALLY FOLLOWED ITS HIRING PROCEDURES AND PROPERLY APPLIED ITS AFFIRMATIVE ACTION PLAN. IN ANY EVENT, THE PROCEDURAL IRREGULARITIES ALLEGED BY ENRIGHT WOULD NOT NULLIFY THE VALIDITY OF THE UNIVERSITY'S DECISION AND ARE NOT DESERVING OF REVIEW BY THIS COURT 11

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Celotex Corp. v. Catrett, 477 U.S. 317 (1985) 8

Higgins v. City of Vallejo, 823 F.2d 351 (1987) 10

Johnson v. Transportation Agency, 480 U.S. 616 (1987) 5, 6, 7, 8, 9, 10

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, California State University, hereby submits opposition to the petition for a writ of certiorari, which seeks review of the decision of the Court of Appeals for the Ninth Circuit, entered on April 26, 1991.

STATEMENT OF THE CASE

A. Summary of Material Facts

Petitioner Robert B. Enright, Jr. (hereinafter "Enright") was first hired by the Chico campus of the California State University (hereinafter "the University") for the academic year 1979-80. He was hired as a temporary Visiting Assistant Professor of Sociology in the College of Behavioral and Social Sciences ("College"). The employment contract which the University offered Enright was for one year only. (District Court Clerk's Record, hereinafter, "CR": 24, pp. 26-27.) Enright was also hired for the following three consecutive academic years (1980-81, 1981-82 and 1982-83) in the same temporary position, and each year he was given a one-year contract. (*Id.* at 30-34, 40.) The University did not hire Enright for the 1983-84 academic year; another candidate was hired as a Visiting Assistant Professor to teach the courses which Enright had previously taught. (*Id.* at 40.)

In 1984, a "tenure-track" position became available in the University's Sociology Department. A "tenure-track" position is a probationary position from which a successful candidate may ultimately be offered tenure and a permanent position. (*Id.* at 30-33.) A nationwide search

was launched in the Spring of 1984 to fill this "tenure-track" position. A hiring committee, composed of the tenured faculty in the Sociology Department, screened the written applications and created a "finalist's list" of 12 candidates who met the job specifications for the particular position. (CR: 20.)

The hiring committee next chose three candidates for personal interviews. The three candidates, including Enright, consisted of two white males and a black female. Pursuant to the hiring procedures utilized by the University, these three choices were approved by the appropriate University officials. However, after the authorization to interview the initial three candidates had been signed, the University was informed that the black female candidate had withdrawn her application. The Sociology Department hiring committee – which had previously decided to invite Dr. Grace Marvin (hereinafter "Dr. Marvin"), a white female, for an interview if the black candidate declined – then extended an invitation to Dr. Marvin. (*Ibid.*)

The hiring committee interviewed the three candidates. At the conclusion of the interviews, the committee recommended that Enright be hired. Dr. Marvin was the committee's second choice. The committee's recommendation was forwarded to the appropriate University officials. (*Ibid.*)

The affirmative action committee for the College of Behavioral and Social Sciences questioned whether affirmative action considerations had been given enough priority by the Sociology Department hiring committee in

reviewing the candidates, and whether Dr. Marvin's credentials had been properly evaluated. Pursuant to University procedure, the Dean of the College reviewed the recommendation of the Sociology Department and the considerations raised by the affirmative action committee. The Dean concluded that Enright and Marvin were very close in their qualifications, but he decided to approve the Sociology Department's recommendation to hire Enright, in deference to the Department's wishes. (*Ibid.*)

The ultimate hiring decision at the University, however, is not made by either a department or the college dean. The final choice must be approved by the University Vice-President for Academic Affairs and Provost, who acts as the University President's designee for final approval of all academic hiring decisions made at the University. The Provost is also charged with the responsibility for implementing the University's affirmative action goals and obligations. (CR: 23.)

The Provost reviewed the written comments and recommendations of the departmental hiring committee, the dean, the affirmative action committee and the University's affirmative action officer. After reviewing the academic qualifications of both Drs. Enright and Marvin and considering the affirmative action goals of the University, the Provost determined that the Sociology Department hiring committee had neither accurately evaluated the academic credentials of Dr. Marvin nor adequately considered the University's affirmative action goals and obligations. Given the fact that women were

underutilized in the University's Sociology Department[1], and mindful of the University's affirmative action plan, the Provost was particularly concerned that an opportunity to hire a qualified woman in that department did not go overlooked. (CR: 21, 23.)

The Provost then informed the College Dean that he could not yet approve the recommended hire of Enright. He asked the Dean to discuss his concerns with the hiring committee and to find a resolution to the hiring question informally. The Provost subsequently received a recommendation from the Sociology Department to hire Dr. Marvin, which was approved. (CR: 23.)

B. Summary of Procedural History

On January 26, 1988, Enright filed an amended complaint under Title VII of the Civil Rights Act of 1964, alleging that the University had failed to hire him as Assistant Professor of Sociology because of his sex. (CR: 4.) The University timely filed its answer. (CR: 8.)

On March 17, 1989, the University filed a motion for summary judgment (CR: 19); on March 31, 1989, Enright filed a cross-motion for partial summary judgment (CR: 25). The district court heard oral argument on both motions on August 18, 1989; the district court announced its intended decision on that date as well. (Court Minutes

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[1] As a federal contractor, the University is required to determine the utilization of women and minorities in each of the University departments and to demonstrate efforts to recruit and hire them if they are underutilized with respect to their availability in the relevant labor pool. (CR: 22.)

(August 18, 1989).) The district court's order granting defendant's motion for summary judgment was entered on October 16, 1990. (CR: 47.) Enright filed a timely notice of appeal to the Ninth Circuit Court of Appeals.

The Ninth Circuit heard oral argument in this matter on February 12, 1991, and filed its unpublished opinion on April 26, 1991.[2] Petitioner filed a suggestion that the case be heard *en banc* on May 12, 1991; the suggestion was denied on July 3, 1991.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE NINTH CIRCUIT PROPERLY DETERMINED THAT THE UNIVERSITY'S APPLICATION OF ITS AFFIRMATIVE ACTION PLAN WAS VALID UNDER *JOHNSON V. TRANSPORTATION AGENCY*, 480 U.S. 616 (1987).

Enright argues that review of the Ninth Circuit opinion is necessary because of what he claims are two important and unsettled questions of law. Paraphrasing his contentions to the Court, it is plain that Enright contends that the issues in this case are: (1) whether this Court should establish a "bright line" as to what constitutes a "manifest" imbalance under the *Johnson* case; and (2) whether rigid adherence to every aspect of an employer's published personnel policies is required before an employer can rely on its affirmative action plan in

[2] Respondent's request to the Ninth Circuit to publish its opinion was denied on August 8, 1991.

making hiring decisions. Neither of these questions is unsettled, and neither requires the attention of this Court.

A. The *Johnson* Case.

In *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), this Court held that an employer's consideration of sex as one factor in a hiring decision is appropriate if done pursuant to an affirmative action plan which is responsive to a "conspicuous imbalance" in a "traditionally segregated job category." (*Id.* at 630.)[3] This Court observed that the effect of such hiring decisions does not improperly trammel the interests of male applicants if sex is but one factor considered. In addition, the *Johnson* decision held that women must compete with all other qualified applicants, that the affirmative action plan must not impose rigid hiring quotas, and that the hiring cannot operate to unseat male incumbents or create an absolute bar to their being hired. (*Id.* at 637-641.) Moreover, the Court noted that if an affirmative action plan is articulated as the basis for an employer's hiring decision, the plaintiff must prove that the plan is invalid and that the employer's justification is a pretext. (*Id.* at 626-627.)

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[3] Enright consistently uses the term "manifest" imbalance to describe the condition which this Court held in the *Johnson* case could be remedied by resort to a valid affirmative action plan. The phrase, which is borrowed from this Court's earlier *Weber* opinion, is used interchangeably with the term "conspicuous" imbalance. Respondent respectfully suggests that a review of the context in which both decisions discuss these terms reveals that both terms were meant to denote a condition in the workplace in which a protected class of individuals is obviously underrepresented. (See, e.g., *Johnson v. Transportation Agency*, 480 U.S. 616, 630-632, *supra*.)

Here, the evidence was irrefutable and uncontroverted that Dr. Marvin, the female sociologist who was hired instead of Enright, was well-qualified for the position and was required to compete with other applicants. In addition, it was uncontroverted by Enright that sex was only one factor in a host of considerations, and that Dr. Marvin's appointment did not dislodge any male professors on the "tenure track".[4] It is also plain that the University's affirmative action plan neither imposes rigid hiring quotas nor creates an absolute bar to male applicants. (See, e.g., CR: 23, Exhibit A, Policy Statement [Section IB, stating that the University is committed to hiring protected class members "when they have been adjudged substantially equal in qualifications to non-protected class members"; Section III, directing that if a protected class is "underutilized",[5] affirmative action goals will be established and affirmative action recruitment and hiring be diligently pursued].)

In his petition to this Court, Enright nevertheless asserts that *Johnson* is inapplicable in this case, arguing that there was an insufficient imbalance in the Sociology

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[4] Enright must concede that he had no "absolute entitlement" to the position (see *Johnson*, 480 U.S. at 638), since it is undisputed that neither the department nor the dean has final hiring authority. That power is vested in the University Vice President for Academic Affairs and Provost, who never exercised the power in Enright's favor. (CR: 23.)

[5] See footnote 1, *supra*.

Department to justify application of the University's affirmative action plan to the disputed hiring process.[6] As both the district court and the Ninth Circuit expressly and appropriately held, Enright's assertions in this regard are not supported by the evidence. Because Enright therefore failed to establish an essential element of his discrimination claim – viz., that the University's affirmative action plan was invalid – the Ninth Circuit properly affirmed the district court's order granting summary judgment in favor of the University. (*Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1985).)

B. The Statistics and Pools Considered by the University Showed "Conspicuous" or "Manifest" Imbalance.

As the *Johnson* case makes clear, the University need not "point to its own prior discriminatory practices, nor even to evidence of an 'arguable violation'" to justify its plan. (*Johnson*, at 630.) Nor is it required that the University prove a disparity sufficient to constitute a prima facie Title VII case. (*Id.* at 632.) To the contrary, *Johnson* specifically holds that " . . . as long as there is a manifest imbalance, an employer may adopt a plan even where the disparity is not so striking . . . " (*Id.* at 633, n. 11.)

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[6] In his arguments to the district court and the Ninth Circuit, Enright also argued that tenure-track Sociology professorships at the University do not constitute an appropriate "traditionally segregated" job. (See *Johnson*, at 631.) Enright has apparently abandoned this position, as it is not raised in the petition for writ of certiorari.

It is enough to show a "conspicuous" disparity (*Id.* at 630) between the percentage of female incumbents and the percentage of qualified females in the relevant pools. (*Id.* at 632.) Indeed the *Johnson* opinion defines "manifest imbalance" as "reflect[ing] underrepresentation of women and minorities" (*Id.* at 631), a definition expressly relied on by the Ninth Circuit in finding a manifest imbalance in this case. (Petitioner's Appendix, p. 2.)

Such a disparity plainly existed in the instant case, where the percentage of females in the relevant labor pool was substantially more than the percentage of tenured and probationary faculty in defendant's Sociology Department, viz., 18% compared to 34%.[7] In attempting to calculate availability of qualified females for its tenured and probationary positions in the Sociology Department, the University looked to national statistics, and particularly to the percent of females receiving doctoral

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[7] In his petition, Enright states that the "utilization" of females in the University's Sociology Department was 22%. (Petition, p. 12.) The figure expressed in the University's affirmative action plan at the time of the hire in question was 18%. (CR: 23, Exhibit A.) Although the difference is not significant because of the substantial gap that existed between the number of available female sociologists (34%) and the actual number employed by the University, the disparity is explained by the fact that two full-time faculty members began semi-retirement in the 1983-1984 academic year and may have still been considered full-time when the federally-mandated utilization reports were last updated prior to the Enright candidacy. (CR: 20.)

degrees in Sociology during the preceding five years.[8] This was an eminently reasonable approach which satisfies all standards enunciated under *Johnson* and its progeny.[9]

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[8] Enright does not directly challenge the use of national statistics, but implies that this was somehow inappropriate. (Petition, pp.12-13.) However, the undisputed facts show that the University conducted a national search for its assistant professor in the instant case (CR: 28, No. 12); hence, its reliance on national statistics for labor pool comparisons was irrefutably proper. (*Johnson v. Transportation Agency*, 480 U.S. 616, 632, *supra*.)

[9] In another reverse discrimination case (*Higgins v. City of Vallejo*, 823 F.2d 351, 356 (1987)), the Ninth Circuit held that a disparity between the percentage of black residents in the city population (17%) and the percentage of black city employees (7.3%) was significant. In evaluating the hiring decisions of the city's fire department, the *Higgins* opinion pointed out that, until 1964, no blacks had ever been hired and that, between 1964 and 1983, only seven other blacks were hired in that department. (*Ibid.*) The scarcity of females in the University's Sociology Department also existed for a long period of time. (CR:35 [University's Sociology Department had no women prior to 1972, and by 1984, when the position for which Enright competed became available, had only two].) Although the University was not actively discriminating against women during that time period – only two positions became available – it can hardly be said that it was improper to stress affirmative action hiring to remedy the past and current imbalance.

II

THE UNIVERSITY SUBSTANTIALLY FOLLOWED ITS HIRING PROCEDURES AND PROPERLY APPLIED ITS AFFIRMATIVE ACTION PLAN. IN ANY EVENT, THE PROCEDURAL IRREGULARITIES ALLEGED BY ENRIGHT WOULD NOT NULLIFY THE VALIDITY OF THE UNIVERSITY'S DECISION AND ARE NOT DESERVING OF REVIEW BY THIS COURT.

Enright also presents an extensive factual argument in support of his claim that the University is not entitled to rely on its affirmative action plan to justify hiring a female sociologist because it allegedly deviated from its Personnel Policies and Procedures manual. Without setting forth any authority for his contention that the alleged deviations have any legal significance, Enright nonetheless sets out two areas where he claims deviations occurred: (1) the alleged impropriety of the comments made by the College affirmative action committee chair concerning Enright's substantive qualifications; and (2) the University Provost's alleged failure to meet with the Sociology Department's hiring committee after he disapproved their initial recommendation for hire.

The Ninth Circuit held that these minor deviations from personnel procedure were irrelevant because they did not violate the University's affirmative action plan. The integrity of the plan is obviously the only relevant issue; an employer can't rely on an affirmative action plan in support of a proposed hire if the employer fails to follow the plan. The Ninth Circuit determined that the alleged deviations in the hiring procedure did not violate the provisions of the affirmative action plan, a determination supported by the facts presented to the appellate

court and not deserving of this Court's review. The petition for certiorari on this ground should be denied.[10]

CONCLUSION

For the foregoing reasons, respondent California State University respectfully urges that the petition for writ of certiorari should be denied.

DATED: August 26, 1991

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[10] University notes that Enright has not demonstrated that the so-called deviations from the University's hiring procedures amount, in and of themselves, to a deprivation of constitutional dimensions. Although the University recognizes a responsibility to adhere to its written hiring procedures in most cases, there can be no doubt that Enright never possessed any *entitlement* to the assistant professorship in the Sociology Department because the mere recommendation of the departmental hiring committee was only one step in the process. The final decision in all hiring matters rests with the University Provost, a fact which Enright has never controverted. (CR: 23.)